RECOMMENDATIONS FOR IMPROVEMENTS TO VERMONT'S BROWNFIELDS PROGRAMS

by

Vermont Environmental Consortium's
Brownfields Project Advisory Committee

January 10, 2007

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Recommendations for Improvements to Vermont's Brownfields Programs

Project history: Vermont Environmental Consortium (VEC) convened a working group of diverse brownfields stakeholders in the fall of 2005, to follow up on opportunities presented at VEC's Brownfields Redevelopment conference that spring. The core committee was made up of environmental scientists and engineers, regional planning commission administrators, developers, and environmental lawyers, with additional input from State agency staff, public health administrators, and brownfields programs administrators from New Hampshire, Massachusetts, and Maine. At meetings held during the following fifteen months, the Committee considered every aspect of Vermont's Brownfields Program and specific aspects of the Redevelopment of Contaminated Properties Program (RCPP). The group arrived at a consensus on ten ways to implement constructive changes.

Goals: The conference and the Committee were catalyzed by a general perception that, with the exception of the Petroleum Cleanup Fund, the RCPP was processing too few sites and presenting unnecessary obstacles to redevelopment. One reason cited for this belief was the huge discrepancy between two neighboring states' programs' effectiveness: In the ten years since its inception, Maine's voluntary brownfields program had processed 257 (non-petroleum) sites, while during the same period Vermont's equivalent program (the RCPP) had processed only three.

The Committee's goal was to develop recommendations that would provide better tools for Vermont's Brownfields Program administrators, improving delivery of the program and thereby encouraging remediation and redevelopment of more brownfields properties. Such properties are defined as those whose expansion, redevelopment, or reuse may be complicated by the presence or, importantly, the potential or perceived presence of a hazardous substance, pollutant, or contaminant.

This document is intended to suggest achievable programmatic and statutory changes to the State Legislature, the Vermont Department of Environmental Conservation, and the Vermont Department of Economic Development, and the Attorney General's office.

General priorities: While the Committee identified many areas with opportunities for improvement, great and small, members agreed to focus on a few priority concerns and those recommendations viewed as most conducive to ready implementation. Broadly, these concerned:

1. Risk and liability management
2. Program administration
3. Financing
4. Standards and risk assessment
5. Outreach and facilitation

These elements cannot be viewed in isolation, but as interdependent factors; in many cases, changes in one category were found to bear upon others. Some of the recommendations require changes in the underlying statutes, others in program guidelines and policies. Some involve simply creating procedures, materials, or "client" relations

guidelines that facilitate a prospective developer's navigation of State brownfields policy and program compliance requirements.

Recommendation 1: Write an explicit statement of mission into the statute.

Context and rationale: The Committee agreed that such a statement is needed to provide a foundation of guidance for program and procedural design and execution. Brownfields program administrators from New Hampshire and Maine indicated that one of the main factors contributing to the efficacy of their programs was the clear guidance provided by underlying statutes.

In particular, the Committee felt that in this statement brownfields remediation should be framed as an *economic and community development* issue as well as a public health and environmental preservation issue.

Brownfields sites tend to be located on prime property in historic downtowns, along transportation corridors, on riverfronts, and in former industrial sites. Recognition of the economic development opportunities and other potential community benefits of such sites will encourage the State, municipalities, community groups, and private developers to remediate pollutants while generating new economic and civic activity.

The Committee believes that recognition of – and effective delivery of -- economic opportunities and incentives for brownfields redevelopment will best serve the common objective of protecting public health and preserving the natural environment. The Committee agreed that the New Hampshire statute provided a good example of language for this purpose (bold emphasis added by the Committee):

TITLE X
PUBLIC HEALTH
Chapter 147-F: Brownfields Program (Eff. July, 1996)

Section 147-F:1 – Findings and Purpose.

I. The general court finds that it is in the public interest to **encourage redevelopment** of industrial, commercial, residential and other properties that have been subject to environmental contamination. **The strict liability imposed on landowners and operators of contaminated property under existing environmental statutes has had the unintended result of discouraging the repurchase and reuse** of some contaminated properties. These properties, often referred to as brownfields, are therefore frequently abandoned or underused. The general court also finds that **it is appropriate to consider the risk posed by the contamination to human health and the environment in light of enforceable restrictions** on the future use of the property when establishing cleanup goals for a contaminated property.

II. The purpose of this chapter is to give incentives to parties interested in the redevelopment of contaminated properties by facilitating the remedial process and by providing comprehensive liability protection to parties who assume responsibility for property remediation without preexisting liability for cleanup or whose existing liability is premised solely upon their status as an owner under strict liability statutes.

III. It is the further intent of the chapter to **expedite the voluntary cleanup of all contaminated properties** by application of the remedial process and approach provided herein where the contaminated property or party conducting the remediation does not qualify for comprehensive liability protection.

Recommendation 2: Provide liability limitations and assurances to developers *early in the redevelopment/program compliance process*; allow developers the option to walk away from a project in the event remediation burdens make further development financially unfeasible.

Context and rationale: Uncertainty – both in terms of cost and time -- is the greatest concern for brownfields redevelopers. As the above section from the New Hampshire statute acknowledges, strict liability tends to discourage developers from even considering a project. This especially true when the outcomes of site investigations are not certain, and when developers risk considerable investment in a project without assurances that they are not incurring unlimited liability and may be subject to a lawsuit by the State, requiring cleanup of a site contaminated by other parties.

A well-intentioned developer acting on the basis of an approved site investigation risks discovering additional contaminants as further site investigation, remediation, and construction proceed. This has several negative ramifications that discourage project development. First, at the outset, the possibility of additional financial risks can discourage lenders from providing needed capital. Second, unanticipated additional costs of remediation can render the project unfeasible, with the risk of legal liability posing a further disincentive to a prospective developer.

As a remedy, the Committee recommends that the State offer a covenant not to sue, formulated after completion of a Phase II site assessment and creation of a Corrective Action Plan (CAP). Such a covenant would allow a developer to either proceed with full remediation and redevelopment, or to stabilize and then abandon a partially-remediated or –developed site, thus providing both developers and lenders with more effective risk management and more leeway in decision making.

The argument against offering a covenant not to sue early in the process is that, if development does not proceed due to the discovery of additional contaminants, the State, now knowing that a public health hazard exists, must assume liability for cleanup expense. However, the Committee felt that the State and the public actually *gain* from this outcome, for the following reasons:

- There is no new liability being created – the contaminants were already there;
- Knowing that contaminants exist (because a developer has discovered them), what they are, and what is needed to clean them up, is far better for the public health than not knowing they are there;
- Even if partially remediated, providing it has been appropriately stabilized, the site presents fewer hazards to health than it did before the developer worked on the site;
- The State can limit human access to a such a site, monitor pollutant transport (travel in groundwater), and better track and regulate a site's future use and development.
- Provided that the developer has not caused a worsening of the environmental

risk and has stabilized the site prior to abandonment, it would not be inappropriate to have either the public, through VDEC, or a subsequent redeveloper, assume responsibility for the remaining remediation.

The Committee believes this consideration should be written into statute so that VDEC compliance/enforcement staff do not feel that they are assuming personal responsibility for decisions made on a discretionary basis.

Again, the Committee found a useful precedent for the language for this provision in the New Hampshire statutes, which provide limitations on developer liability while adequately protecting the State's interests. The relevant sections are:

TITLE X
PUBLIC HEALTH
Chapter 147-F
Brownfields Program

Section 147-F:6 – Covenant Not to Sue

I. The covenant not to sue shall protect against liability for contamination addressed by an approved remedial action plan, including any modifications made pursuant to RSA 147-F:13.

II. The covenant shall be in form approved by the Department of Justice and shall contain a general description of the property and the contamination, a summary of the approved remedial action plan and a detailed description of any use restrictions placed on the property, including their scope and purpose, and the possibility of additional or modified use restrictions imposed by the department . . . The covenant shall be expressly conditioned upon the provisions of paragraphs III and IV of this section.

III. (a) The covenant shall be voidable if the holder of the covenant:

(1) Engages in activities at the property that are inconsistent or interfere with the approved remedial action plan;

(2) Withdraws from the program before completion of the remedial action plan and fails to stabilize the property in accordance with RSA 147-F:16;

(3) Violates any use restrictions imposed on the property by the department . . .

(4) Fails to comply with program requirements under RSA 147-F:16.

(b) The holder of the covenant shall be given a reasonable opportunity to cure the noncompliance after notice by the department, except that any knowing violation of any use restriction shall void the covenant. Notwithstanding cure, the holder of the covenant shall be liable for the increased harm to human health and the environment caused by the noncompliance.

. . . .

VI. The covenant shall be appurtenant to the property as follows:

(a) Upon recordation with the certificate of completion issued in accordance with RSA 147-F:13, III, the covenant not to sue shall be appurtenant to, bind and run with the eligible property. The property deed and all

subsequent instruments of conveyance relating to the eligible property shall reference, by book and page number, the covenant not to sue and the certificate of completion . . .

(b) No provision of the covenant shall be deemed void by reason of the rule against perpetuity.

Section 147-F:7 – Liability Protection Before Covenant Issues

I. Site investigation and pre-remedial activities conducted at the property during participation in the program shall not trigger liability for remediation of preexisting contamination at the property solely because of the eligible person's status as owner or operator of the property under the strict liability provisions of [other N.H. statues], as applicable.

II. An eligible person participating in the program shall not be liable for the remediation of additional contamination or increased environmental harm caused during site investigation or pre-remedial activities unless attributable to the eligible person's negligent or reckless conduct, except as provided in RSA 147-F:8, I(b).

III. An eligible person who withdraws from the program after site stabilization . . . shall not be strictly liable as an owner under RSA 147-B:10 for preexisting contamination at the property that is know or foreseeable based upon information submitted to the department before withdrawal from the program ...

The Committee reviewed commercial insurance programs, with various forms of integration into the State program, as possibilities for liability limitation; however, the group concluded that none were viable in Vermont. Insurers are unwilling to provide coverage for the smaller sites that are typical of Vermont, because the site review and policy analysis by underwriters is prohibitively time-consuming and costly; in most cases the cost of insurance would exceed that of remediation. Nor is "bundling" – that is, grouping a number of smaller sites under a single policy – a viable option, for the same reason: insurers would still require individual site review, accruing prohibitive costs.

Recommendation 3: Administration of the Vermont Brownfields Program should be shared between the Agency of Natural Resources/DEC and the Agency of Commerce/DED. Create an interdepartmental committee – one that includes legislators, regional planning commission representatives, members of the development community, and other stakeholders -- to provide oversight of program delivery and funding.

Context and rationale: Administration by an interdepartmental body and shifting some measure of administration from the DEC to the DED will assure that the economic development perspective is part of program implementation and funds allocation. Creation of this body should be stipulated in statute. Examples of such a body exist in nearby states, including Massachusetts and New Hampshire, where voluntary interdepartmental committees have proved successful, as has Vermont's Petroleum Cleanup Fund board.

One advantage of this body is that it can objectively monitor and track long-term program effectiveness. In addition, the joint – and early -- consideration of brownfields program issues and redevelopment projects by the primary agencies and other stakeholders will assure that fewer disagreements arise later in any process; that no agency or department staff face unexpected workloads, changes in procedure, or confusions over responsibility and decision-making processes.

This will benefit all parties concerned. For program administrators, this early-stage meeting of minds will provide stable, consistent guidance and clear delineation of responsibilities; for the public, it will assure improved communication with and accountability from the State in regards to any specific site; for developers, it will provide clear guidance and assurances early in a redevelopment process. All will lead to more effective program administration and to expedited remediation of eligible properties.

Recommendation 4: Create a permanent, adequately-paid position of brownfields coordinator, whose mission is to give clarity to brownfields administration and to be a clear and powerful advocate for effective brownfields redevelopment.

Context and rationale: Though a similar position was recently created, and the Committee does not question the competence of the individual currently occupying the position, the group believes that the position does not provide a salary attractive to an individual with the right combination of administrative, scientific, and public relations skills.

More importantly, the position must have clearly-defined duties and the organizational and program tools needed for success. The job role should be explicitly to *make brownfields redevelopment successful*. (See Recommendation 5.) The Committee recommends that the specific charges for this position should include:

- Liaising among agencies, the joint program oversight committee, and other stakeholders;
- Working with brownfields project developers and state agencies to ensure that an appropriate assessment is completed and the site is properly positioned for cleanup and reuse;
- Conducting active outreach to municipal and regional planners and relevant community organizations, clarifying the Brownfields Program (and specifically the RCPP) process and articulating any new developments affecting program guidelines or funding availability;
- Tracking program effectiveness and the number and scope of projects redeveloped and reporting on same to administrators and legislators, as required;
- Listening to and recording the perspectives of redevelopers and communities to conduct ongoing program improvements;
- Encouraging and facilitating local and regional partnerships to support remediation projects.

Recommendation 5: Articulate the goals of the Brownfields Program and RCPP and train staff in client relations in such a way that the public agencies are perceived as supporting and facilitating redevelopment, not obstructing it.

Context and rationale: One of the Committee's important findings bears upon the way brownfields staff perceive their roles – i.e., primarily to "protect public health and protect the State's purse" – and relate to program clients.

When comparing the number of sites processed in Vermont with other New England states – far fewer have been processed in Vermont – the Committee looked not just for structural causes but also attitudes that inform the institutional culture of departments involved in brownfields program administration. In many cases, based on accounts from brownfields administrators in New Hampshire, Maine, and Massachusetts, the Committee found that program structure was less at fault than the prevailing sense of mission within the responsible agency.

In Vermont, many prospective developers report that they have experienced an attitude of opposition from the regulatory agencies. By contrast, the New Hampshire and Maine administrators have intentionally developed a client-friendly "front end" – that is, their literature and staff-client communications are designed to welcome prospective developers: "We are here to *help you develop your brownfields site,* because in doing so you are helping us do our job to clean up the environment."

The latter attitude derives in part from an increased emphasis on economic development as a motive for brownfields redevelopment. It is also contingent upon having statutory and procedural guidelines that permit more facilitation and assistance. Finally, it is simply a matter of providing proper guidelines for and training in staff-client communications.

Recommendation 6: Formalize a commitment to expeditious processing.

Context and rationale: Time is of the essence for all developers. For any substantial project, delays are very costly as staff time accumulates, retainer fees expend, materials and services costs inflate, building seasons are missed, or date of occupancy is postponed. The Committee agreed that, given that developers pay an application fee of $500 and a $5,000 oversight fee, they should receive prompt action on requests for covenants not to sue and approval of corrective action plans. In New Hampshire, with departmental staffing capacity comparable to Vermont's, the brownfields program operates with an explicit commitment to respond with 30 days.

Recommendation 7: Encourage the creation of Tax Increment Financing provisions as part of the Designated Downtowns and Growth Centers programs that will help municipalities create incentives for brownfields redevelopment.

Context and rationale: The Committee is well aware that adequate funding is crucial to implement improved and expanded brownfields remediation in Vermont. While the Petroleum Cleanup Fund is funded by a per-gallon tax on petroleum distributors, the Committee deemed unfeasible the creation of new taxing schemes to fund brownfields programs.

However, the Downtowns and Growth Center tax increment financing (TIF) model has potential to provide additional funds for brownfields redevelopment at the discretion of municipalities. Currently, Title 32 Taxation and Finance, Subtitle 2, Chapter 135, 5404a, (4), Project Criteria, *does* specify that brownfields redevelopment

projects are among the eligibility criteria for tax increment financing. While such projects may *produce* TIF revenues, however, the statute does not provide for such financing to be *applied* to funding brownfields redevelopment or remediation (bold emphasis added):

> (e) Allocations
> A municipality . . . may apply to the Vermont Economic Progress Council for an allocation of the education grand list value for up to ten years, of a portion of the increase in the value and liability assessed . . . on new economic development . . . If allocated, the allocated portion of the education fund liability **shall be used by the municipality for infrastructure that includes wastewater treatment, water supply, transportation, and telecommunications and utility connections.**

The Committee recommends that the statute be amended to specify that brownfields cleanup is among the allowable uses of such allocations, to be used in a district at its discretion.

Use of TIF funds for this is entirely in accord with the stated "smart growth" objectives of the Designated Downtowns and Growth Center programs, because it encourages redevelopment and revitalization of town-core sites – infill development as opposed to sprawl.

Recommendation 8: Develop guidelines that permit a more risk-based, multi-tiered system for remediation requirements, as opposed to rigid standards-based criteria.

Context and rationale: Standards-based requirements, while providing an objective metric for levels of contaminant presence, fail to take into consideration the realistic likelihood of human exposure to pollutants in a given development plan. Risk-based action plans are more adaptive to each site and specific project, and are geared to assuring public health while providing options for redevelopment that may be less expensive – and thus more attractive. Brownfields administrators in neighboring states stated that their system of developing and considering several CAPs (corrective action plans), each with varying degrees of risk-based remediation, allows administrators flexibility in negotiating a final plan that accommodated both the public interest and the developer, and helps reduce financial cost and liability.

The argument offered for Vermont's rigid standards and procedures is that program administrators are vigilant guardians of the public good, and want to assure that Vermont meets the highest standards for environmental health and cleanliness. However, the high bar of standards acts as a discouragement to site redevelopment, leading to *more* contaminants remaining in Vermont soils rather then fewer. With Vermont's RCPP program reporting three projects (not including petroleum-polluted sites) completed during the last 10 years, and Maine's reporting 370 in the same period, this argument can no longer be justified. At the least, rigid standards tend to deflect developers away from the RCPP; more generally, by discouraging redevelopment, they leave many potentially valuable sites unremediated, undeveloped, and continuing to present potential public health risks.

The Committee agreed that the public interest would be best served by more properties being redeveloped, even if standards were modified to permit of risk-based pollutant management, supplemented by appropriate institutional controls such as use restrictions entered into land records.

Recommendation 9: Amend guidelines to selectively allow partial remediation of properties that are to be only partially redeveloped.

Context and rationale: Currently, developers planning to redevelop only a portion of a larger lot are obligated to remediate the entire lot if contaminants have been identified, or to remediate all contaminants identified regardless of intended uses of the site that could significantly reduce risk of exposure. Under Vermont's RCPP, partially-remediated and -redeveloped lots cannot receive complete liability limitation and a certificate of completion. Again, this tends to deflect developers away from RCPP participation, possibly leading to less rigorous site investigations; or, typically, causing them to circumvent the program's intent by subdividing -- thus limiting the obligation to remediate to the lot portion to be developed –, a cumbersome and pointless process.

Permitting partial remediation of sites and providing proportionate liability limitation will benefit developers by allowing them a greater range of redevelopment options and serving to reduce cost of remediation, both of which will provide more encouragement to redevelopment. At the same time, it reduces public health risk by eliminating at least some contaminants at the specific site, and, more broadly, by encouraging more such sites to be remediated.

The State can still protect public health with partial remediation if it is considered as an option on a site-by-site basis. Sites found to have highly-toxic contaminants, high likelihood of human exposure, or traveling pollutant plumes can be excluded from the partial remediation option. For partially-remediated, stable sites with identified lesser risks, the State can also protect public health by limiting access and requiring institutional controls on development. Maine's guidelines allowing partial remediation have proven effective at encouraging redevelopment and protecting health.

Recommendation 10: Create scientific contaminant standards based on background level studies.

Context and rationale: In many cases, developers are obligated to remediate if certain thresholds of contaminant are found at a site, when that same level of contaminant presence may be typical of the region. This can place an unfair burden on a developer, in that he or she is obligated to make the site *cleaner* than prevailing averages – the public park or residential parcel across the street may contain the same or greater concentration of metals or PAHs (polynuclear aromatic hydrocarbons), for example, and pose no less of a public health risk than the developer's property.

To avoid placing this unequal burden on developers, the State should know more about background levels and should allow relative regional levels to figure in design of redevelopment plans. The Committee recommends that the State incorporate in the Brownfield Program guidelines a soil survey protocol that would establish reasonable

estimates of background levels near brownfields projects, and include these in determination of remediation requirements.

The Committee acknowledges that conducting a comprehensive statewide soil survey, though desirable, would be an expensive and long-term project. Even so, the Committee believes it can be accomplished through agency collaborations with related programs at colleges and universities, which can assist implementation with interns as part of student research projects. In addition, the survey costs can be reduced if conducted in conjunction with other needed resource surveys – e.g., soil mapping for agricultural purposes, watershed mapping, and renewable energy resource mapping.

Easier to implement would be a process by which a local area survey would be conducted in the vicinity of brownfields redevelopment projects. Such a survey would not need to be conducted for projects dealing with highly injurious and usually highly localized contaminants such as PCBs, but for those containing more common and more broadly distributed -- and, in some cases, less hazardous -- soil factors/contaminants such as lead and PAHs. The cost of such a survey could be borne by the developer or by both developer and the State.

From the developer's perspective, the latter solution adds an additional (relatively minor) expense; however, it is likely to significantly reduce the cost and extent of remediation. From the State's perspective, the cost of any such local area survey would be offset by the economic stimulus of increased redevelopment – and the additional tax revenues derived from it. In addition, the data obtained would provide valuable information about regional and local soil compositions, to be applied in a number of ways to benefit the public health and the natural environment.

Respectfully submitted,

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